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COURT OF CRIMINAL APPEALS
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COURT OF CRIMINAL APPEALS
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TO THE COURT OF CRIMINAL APPEALS

OF THE STATE OF TEXAS

ORLANDO ORTIZ, Appellant

v.

THE STATE OF TEXAS, Appellee

Appeal from La Salle County

* * * * *

STATE'S PETITION FOR DISCRETIONARY REVIEW

* * * * *

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NAMES OF ALL PARTIES TO THE TRIAL COURT'S JUDGMENT

*The parties to the trial court's judgment are the State of Texas and Appellant, Orlando Ortiz.

*The case was tried before the Honorable Donna S. Rayes, 81st/218th District Court, La Salle County, Texas.

*Counsel for Appellant in the trial court was Adrian Perez, 310 S. Saint Mary's St., Ste. 875, San Antonio, Texas 78205-3153.

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TO THE COURT OF CRIMINAL APPEALS

OF THE STATE OF TEXAS

ORLANDO ORTIZ, Appellant

v.

THE STATE OF TEXAS, Appellee

* * * * *

STATE'S PETITION FOR DISCRETIONARY REVIEW

* * * * *

TO THE HONORABLE COURT OF CRIMINAL APPEALS:

When the State alleges assault by a specific statutory manner, means, and injury, proof of a different assault is not within the proof necessary to establish the charged offense.

STATEMENT REGARDING ORAL ARGUMENT

The State does not request oral argument.

STATEMENT OF THE CASE

Appellant was charged with "assault by occlusion" as defined by TEX. PENAL CODE § 22.01(b)(2)(B), a third-degree felony. He was denied an instruction on misdemeanor assault. The court of appeals held this was error and reversed.

STATEMENT OF PROCEDURAL HISTORY

The court of appeals reversed appellant's conviction in an unpublished opinion.[1] No motion for rehearing was filed. The State's petition is due October 11, 2019.

GROUND FOR REVIEW

When a defendant is charged with "assault by occlusion" pursuant to TEX. PENAL CODE § 22.01(b)(2)(B), does the denial of occlusion and admission to causing different injuries entitle him to an instruction on simple assault?

ARGUMENT AND AUTHORITIES

Appellant was indicted under TEX. PENAL CODE § 22.01(b)(2)(B), commonly referred to as "assault by occlusion."[2] This subsection explains that an assault under Subsection (a)(1)—intentionally, knowingly, or recklessly causing bodily injury—is a felony of the third degree if, *inter alia*, "the offense is committed by intentionally, knowingly, or recklessly impeding the normal breathing or circulation of the blood of the person by applying pressure to the person's throat or neck or by blocking the person's nose or mouth."[3] The State committed in *voir dire* and opening statement to proving this.[4]

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[1] *Ortiz v. State*, No. 04-18-00430-CR, 2019 WL 4280074 (Tex. App.–San Antonio Sept. 11, 2019) (not designated for publication).

[2] 1 CR 1.

[3] TEX. PENAL CODE § 22.01(b)(2)(B). In this case, a dating relationship was also required.

[4] 2 RR 23, 152-53.

The victim testified that appellant choked her repeatedly with both hands; at times she could not breathe, swallow, or keep her eyes open; she felt like she would pass out.[5] Appellant testified to committing numerous acts that could have caused bodily injury.[6] As it related to the charged offense, however, he said he grabbed the victim's neck for "[a] couple seconds" but "did not squeeze or try to choke her out."[7] He also said that when he held her face down on the bed he "wasn't smothering her."[8]

Appellant requested (without explanation) an instruction on the "lesser included" offense of assault family violence.[9] It was denied.[10] The court of appeals held this was error under the two-step cognate-pleadings approach of *Hall v. State*.[11] First, it said simple assault under Subsection (a)(1) is legally a lesser-included offense because it is "within the proof necessary to establish assault family violence by strangulation."[12] Second, it held a rational jury could find appellant guilty only of

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[5] 3 RR 109-11, 113, 179, 184, 188, 216.

[6] 4 RR 79, 114 (pushed her on the bed); 4 RR 79-80, 121 (held her down); 4 RR 80-81, 119 (grabbed her arm or wrist); 4 RR 83 (caught her leg as she kicked him and heard her knee "pop").

[7] 4 RR 81-82, 105, 119-20.

[8] 4 RR 115-17.

[9] 4 RR 157.

[10] 4 RR 157.

[11] 225 S.W.3d 524, 531 (Tex. Crim. App. 2007).

[12] Slip op. at 6 (quoting *Hardeman v. State*, 556 S.W.3d 916, 921 (Tex. App.–Eastland 2018, pet. ref'd)). *See* TEX. CODE CRIM. PROC. art. 37.09(1) ("An offense is a lesser included offense if: (1) it is established by proof of the same or less than all the facts required to establish the commission of the offense charged.").

assault because it could have believed he did not choke the victim but caused injury to her knee, arms, neck, shoulders, or wrists.[13]

The occlusion language is not a mere enhancement add-on.

By holding that Subsection (b)(2)(B) is just bodily-injury assault "with two additional requirements,"[14] the court of appeals treats the subsection like an aggravating element that is either present or not. But the occlusion language is not an addendum to the charged assault—it *is* the charged assault. This is true as a matter of law and of fact.

"By," not "and"

The simplest way to explain what Section (b)(2)(B) does is to compare its language to that of aggravated assault. Under Section 22.02, a person commits aggravated assault if he commits an assault "and" he causes serious bodily injury or uses or exhibits a deadly weapon.[15] In contrast, Section 22.01 makes a misdemeanor assault a felony if, *inter alia*, it "is committed by" specific conduct causing a specific result.[16] As this Court said in *Price v. State*, "impeding the normal breathing or circulation of the blood of the person" is "the required injury";[17] "by applying

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[13] Slip op. at 6-7.

[14] Slip op. at 6 (quoting *Hardeman*, 556 S.W.3d at 921).

[15] TEX. PENAL CODE § 22.02(a).

[16] TEX. PENAL CODE § 22.01(b)(2)(B).

[17] 457 S.W.3d 437, 442-43 (Tex. Crim. App. 2015).

pressure to the person's throat or neck or by blocking the person's nose or mouth" is "the manner and means by which th[at] result . . . may be achieved."[18] Because the "obstructing or impeding" element the jury is required to find is "a specific type of bodily injury," this Court added in *Marshall v. State* that the State need not prove a separate bodily injury and there is no egregious harm when the basic "bodily injury" element is missing from an application paragraph.[19]

If these cases are correct, Subsection (b)(2)(B) must be viewed is as a specific, statutory gravamen and manner and means. That has consequences. The State is bound by the statutory option it chooses; proof of a different, uncharged manner and means will not support a conviction.[20] If the State cannot allege a specific statutory manner and means and rely on proof of another, a defendant should not, either. *Pled, proved, joined, and argued.*

Even if Subsection (b)(2)(B) were not a statutory manner and means of committing assault, appellant should not be able to hijack the State's case and turn

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[18] *Id*. at 443.

[19] 479 S.W.3d 840, 844-45 (Tex. Crim. App. 2016).

[20] *Thomas v. State*, 444 S.W.3d 4, 8 (Tex. Crim. App. 2014); *Avery v. State*, 359 S.W.3d 230, 237 (Tex. Crim. App. 2012). The technical reason is that "a variance involving statutory language that defines the offense always renders the evidence legally insufficient to support the conviction (*i.e.* such variances are always material)." *Johnson v. State*, 364 S.W.3d 292, 298 (Tex. Crim. App. 2012). *See*, *e.g.*, *Geick v. State*, 349 S.W.3d 542, 548 (Tex. Crim. App. 2011) (State pled theft by deception but failed to prove deception); *Cada v. State*, 334 S.W.3d 766, 776 (Tex. Crim. App. 2011) (State pled retaliation against a witness but proved retaliation against an informant); *Avery*, 359 S.W.3d at 239 (State pled "fraudulent prescription form" but proved "fraudulently altered prescription form").

it into a trial on the assault of his choice.

No one is arguing that appellant did not cause multiple injuries in various ways on or before the date alleged in the indictment. But appellant's willingness to claim he hurt her neck in a more general way is no more relevant than his willingness, on appeal at least, to substitute grabbing her wrist. The State chose a specific type of injury caused by a specific type of conduct and pursued this allegation through closing argument.[21] Appellant had no right to foist upon it a different crime in order to reduce what would should be a third-degree felony to a Class A misdemeanor.[22]

Trial counsel knew what this case was about.

In his deferred opening, defense counsel said appellant "is guilty of getting into it with [the victim, . . . b]ut the evidence is going to show that he is not guilty for what he's indicted. He did not strangle her. He did not choke her[.]"[23] His closing argument matched this strategy:

> We're not here about misdemeanor assault. . . . [H]e is charged with strangling her, which he didn't do. . . . The DA could have charged him with misdemeanor assault or some lesser crime. They didn't. So this is the ballgame that we have before us today.
> . . .

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[21] 4 RR 160, 162, 175, 182.

[22] *See Bufkin v. State*, 207 S.W.3d 779, 781 (Tex. Crim. App. 2006) ("It is certainly true that the defendant cannot foist upon the State a crime the State did not intend to prosecute in order to gain an instruction on a defensive issue or a lesser included offense."). The result might be different had he denied being in a dating relationship instead of the statutorily modified gravamen.

[23] 4 RR 66.

> And, yes, he grabbed her by the neck. But this jury charge does not say you're guilty of strangulation by grabbing somebody around the neck. This jury charge says that you're guilty of strangulation by effect -- by impeding circulation or breath. He never squeezed.
> . . .
> He shouldn't have hit her; he admitted to hitting her. The DA's office should have charged him with that. He didn't choke her.[24]

Defense counsel recognized what this and other courts of appeals[25] do not: a prosecutor who alleges assault by occlusion has made the case about assault by occlusion. The State should not be permitted to ignore that statutory language and call it a "lesser-included offense." Nor should the defense.

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[24] 4 RR 167-71.

[25] In addition to this court and the Eleventh (*Hardeman*), at least two others agree that simple assault is a lesser-included offense of assault by occlusion. *Harrison v. State*, No. 06-11-00196-CR, 2012 WL 1813519, at *6 (Tex. App.–Texarkana May 18, 2012, pet. ref'd) (not designated for publication); *Amaro v. State*, No. 08-14-00052-CR, 2016 WL 3344568, at *9 (Tex. App.–El Paso June 14, 2016, no pet.) (not designated for publication).

PRAYER FOR RELIEF

WHEREFORE, the State of Texas prays that the Court of Criminal Appeals grant this Petition for Discretionary Review, reverse the court of appeals's decision, and remand for consideration of appellant's remaining point.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

The undersigned certifies that according to the WordPerfect word count tool the applicable portion of this document contains 1,542 words.

/s/ John R. Messinger
JOHN R. MESSINGER
Assistant State Prosecuting Attorney

CERTIFICATE OF SERVICE

The undersigned certifies that on this 1st day of October, 2019, the State's Petition for Discretionary Review was served electronically on the parties below:

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APPENDIX

Fourth Court of Appeals
San Antonio, Texas

MEMORANDUM OPINION

No. 04-18-00430-CR

Orlando **ORTIZ**,
Appellant

v.

The **STATE** of Texas,
Appellee

From the 218th Judicial District Court, La Salle County, Texas
Trial Court No. 17-06-00056-CRL
Honorable Donna S. Rayes, Judge Presiding

Opinion by: Irene Rios, Justice

Sitting: Patricia O. Alvarez, Justice
Irene Rios, Justice
Beth Watkins, Justice

Delivered and Filed: September 11, 2019

REVERSED AND REMANDED

Orlando Ortiz was convicted by a jury of felony assault involving family violence by occlusion.[1] On appeal, Ortiz contends the trial court erred by: (1) denying his request to include the lesser-included offense of misdemeanor assault in the jury charge; (2) admitting several photographs as evidence. Because we hold some harm resulted from the trial court's erroneous

[1] Occlusion is shown by "impeding the normal breathing or circulation of the blood of the person by applying pressure to the person's throat or neck or by blocking the person's nose or mouth." TEX. PENAL CODE ANN. § 22.01(b)(2)(B). An assault involves "family violence" when it is "committed against a person whose relationship to or association with the defendant is described by Section 71.0021(b), 71,003, or 71.005, Family Code." *See id*. Section 71.0021(b) describes dating relationships which include relationships "between individuals who have or have had a continuing relationship of a romantic or intimate nature." TEX. FAM. CODE ANN. § 71.0021(b).

failure to include the lesser-included offense, we reverse the trial court's judgment of conviction and remand the cause to the trial court for further proceedings. We do not address Ortiz's second issue regarding the photographs. TEX. R. APP. P. 47.1 (providing opinions should be as brief as practicable and address only those issues necessary to final disposition of the appeal).

BACKGROUND

Ortiz was charged with two counts of sexual assault and one count of felony assault involving family violence by occlusion. The evidence at trial established Odilia Gomez did not report for work on August 12, 2016, and did not respond to text messages. As a result, her boss reported her concern to an administrative assistant at the La Salle County Sheriff's Office, and Sergeant Ricky Galvan was dispatched to Gomez's home to check on her.

Sergeant Galvan testified he went to Gomez's home, and her sons stated they were unsure of her location. Later that afternoon, however, Gomez sent a text message which led Sergeant Galvan and other officers to her location. Upon arriving at the location, Sergeant Galvan testified he knocked on the back door and asked for Ortiz, who Sergeant Galvan understood was Gomez's ex-boyfriend. Ortiz was asked to step outside into the back yard, and the owner of the home gave Sergeant Galvan permission to enter. Upon entering, Sergeant Galvan saw Gomez bruised and limping and asked if she wanted to go home. When Gomez said she did, Sergeant Galvan assisted her outside through the front door and called EMS. Sergeant Galvan proceeded to take photographs of Gomez's injuries which were admitted into evidence.

Gomez testified she previously lived with Ortiz for a period of time until their relationship ended in July of 2016. On August 12, 2016, Gomez stated she went to the house where Ortiz was staying because Ortiz had texted her about damage to a motorcycle she and one of her sons owned which was at that location. Ortiz was living in a bedroom next to a garage or shop which was a separate building from the house. Gomez admitted she had consensual sex with Ortiz and stayed

the night with him at that location on August 10, 2016. Gomez stated Ortiz was angry when she arrived and ordered her into his bedroom. As she entered the room, Gomez testified Ortiz hit her on the back of the head, knocking her onto the bed and then continued hitting her. After Gomez turned to lay on her back, she testified Ortiz started choking her while restraining her with his knees on her arms. After Gomez was able to push Ortiz off her at one point, she stated he then proceeded to choke her again. When Gomez was able to push Ortiz off again, she stated he grabbed and twisted her left leg, causing her great pain as her knee popped. Gomez testified Ortiz then tried to stab her in the neck with a knife, and, during the subsequent struggle over the knife, Ortiz put his hands over her hands and tried to stab himself with the knife. Gomez stated Ortiz told her she would be responsible if he died, and he then used an extension cord in an attempt to hang himself. When he stopped that attempt, Gomez stated he proceeded to verbally abuse her over her posts with men on Facebook and demanded oral sex. Gomez testified she later asked for a glass of water, and, in response to Ortiz's request through the window to the bedroom, a friend handed him a glass of water and a bottle of water that was frozen. Gomez stated Ortiz then asked Gomez if she would have intercourse with him, and she acquiesced. When Ortiz said the intercourse was not working for him, Gomez testified he again demanded oral sex. During that time, Gomez testified Ortiz hit her with the frozen water bottle on the side of her head and on her right forearm when she tried to block another blow to her head. Gomez stated she then asked to use the restroom which was in the house, and Ortiz assisted Gomez inside the house. After Ortiz left to pick up food, Gomez testified she sent the text message which led law enforcement to her location.

Gomez was transported to a hospital by ambulance and then driven by her son to another hospital for a sexual assault exam several hours later. The nurse who examined Gomez testified regarding her injuries which included swelling, abrasions, and bruising. Photographs of the injuries taken by the nurse were admitted into evidence.

Investigator Esmeralda Gonzalez testified she was also dispatched to the scene and observed the injuries to Gomez. Investigator Gonzalez took additional photographs of the injuries which were admitted into evidence. Investigator Gonzalez also took photographs of Gomez's injuries three days later which were admitted into evidence.

Ortiz testified he and Gomez planned to see each other on August 12, 2016, after she spent the night with him on August 10, 2016. Ortiz texted Gomez not to come over after a friend showed him posts from Gomez's Facebook account of Gomez flirting with another man. Ortiz testified he and Gomez began arguing when she arrived because he was upset that Gomez constantly accused him of cheating while she was flirting with other men. Ortiz admitted he pushed Gomez to the bed with an open palm to the back of her head when she swung at him. Ortiz stated he also grabbed Gomez's arm when she swung at him a second time. Ortiz further admitted he restrained Gomez to keep her from hitting him which included grabbing her with both of his hands around her neck. Ortiz denied squeezing Gomez's neck or attempting to choke her. Ortiz further admitted that he caught Ortiz's leg and pushed it when she tried to kick him, and he heard her knee pop. Because the pop scared him, Ortiz told Gomez he wanted to take her to the hospital, but Gomez did not want to go. Ortiz testified he and Gomez calmed down and began talking. Ortiz stated he handed Gomez a knife and told her to hurt him if she wanted. Ortiz further stated he threw an extension cord over the rafters in the room to see if Gomez wanted him to hurt himself in that manner. Ortiz and Gomez continued to talk and then engaged in consensual sex. Ortiz testified he later carried Gomez inside the house to use the restroom, and they watched television for about three hours before he left to pick up food. Ortiz testified Gomez's injuries shown in the photographs were likely the result of the "scuffle on the bed" during which Gomez was lying on top of his boots which were on the bed.

After hearing all the evidence, the jury acquitted Ortiz of the sexual assault charges but found him guilty of the felony offense of assault involving family violence by occlusion. Ortiz was sentenced by the trial court as a habitual offender to forty years' imprisonment. The trial court entered judgments of acquittal on the sexual assault charges and a judgment of conviction on the felony charge of assault involving family violence by occlusion. Ortiz appeals the judgment of conviction.

LESSER-INCLUDED OFFENSE

In his first issue, Ortiz contends the trial court erred in denying his request to include the lesser-included offense of misdemeanor assault in the jury charge.

"We use a two-step analysis to determine if a defendant is entitled to a lesser-offense instruction." *Ritcherson v. State*, 568 S.W.3d 667, 670 (Tex. Crim. App. 2018). First, we compare the statutory elements and the facts of the offense as alleged in the indictment with the statutory elements of the requested lesser-included offense to determine whether the lesser-included offense is included within the proof necessary to establish the charged offense. *See id*. at 670-71. "Second, there must be evidence from which a rational jury could find the defendant guilty of only the lesser offense." *Id*. at 671. "[The second] requirement is met if there is (1) evidence that directly refutes or negates other evidence establishing the greater offense and raises the lesser-included offense or (2) evidence that is susceptible to different interpretations, one of which refutes or negates an element of the greater offense and raises the lesser offense." *Id*. "The evidence raising the lesser offense must be affirmatively in the record." *Id*. "We consider all admitted evidence without regard to the evidence's credibility or potential contradictions or conflicts." *Roy v. State*, 509 S.W.3d 315, 317 (Tex. Crim. App. 2017). "[I]f there is more than a scintilla of evidence raising the lesser offense and negating or rebutting an element of the greater offense, the defendant is entitled to a lesser-charge instruction." *Ritcherson*, 568 S.W.3d at 671.

Here, the State concedes the first prong of the test was met, and we agree. "Section 22.01 of the Texas Penal Code describes assault family violence by occlusion as assault with two additional requirements—that it be committed against a family member and be committed by occlusion."[2] *Hardeman v. State*, 556 S.W.3d 916, 921 (Tex. App.—Eastland 2018, pet. ref'd); *see also* TEX. PENAL CODE ANN. § 22.01(b)(2)(B). "Accordingly, simple assault is a lesser included offense because it is included within the proof necessary to establish assault family violence by strangulation." *Hardeman*, 556 S.W.3d 921.

Next, we consider whether there is evidence from which a rational jury could find Ortiz guilty of only the lesser offense. *See Ritcherson*, 568 S.W.3d at 671. The State contends the second prong of the test was not satisfied because there was no evidence to support a finding that Ortiz caused Gomez bodily injury but did not choke her. The State asserts the jury "would have to disbelieve [Gomez's] testimony that [Ortiz] choked her, while simultaneously believing that the placing of [Ortiz's] hands on her neck caused bodily injury." Ortiz responds that the bodily injury necessary to be shown for the lesser offense of assault was not required to be bodily injury to Gomez's neck.

As previously noted, the second prong of the test is met "if there is more than a scintilla of evidence raising the lesser offense and negating or rebutting an element of the greater offense." *Ritcherson*, 568 S.W.3d at 671. Based on the evidence presented at trial, the jury could have believed Ortiz's testimony that he did not choke Gomez.[3] The jury could also have found from the testimony, however, that Ortiz caused bodily injury to Gomez's knee, which the testimony

[2] *Hardeman* uses the term "family member;" however, as previously noted, family violence extends to dating relationships. *See* TEX. PENAL CODE ANN. § 22.01(b)(2)(B); TEX. FAM. CODE ANN. § 71.0021(b).

[3] Ortiz's testimony that he did not choke Gomez makes this case factually distinguishable from our unpublished opinion in *Johnson v. State*, No. 04-17-00398-CR, 2018 WL 3260921 (Tex. App.—San Antonio July 5, 2018, pet. ref'd) (mem. op., not designated for publication), which the State cites in its brief. In *Johnson*, the record did not contain any "affirmative evidence to negate the evidence that the victim was choked." *Id*. at *2.

established popped based on Ortiz twisting or pushing Gomez's leg. Alternatively, the jury could have found Ortiz caused the bruising to Gomez's neck, arms, shoulders, and wrists by his actions in restraining her, while disbelieving he was restraining her because she was attacking him. In other words, the jury could have found Ortiz caused bodily injury to Gomez but did not choke her by believing portions of the testimony presented at trial while disbelieving other portions. Accordingly, we hold there is evidence from which a rational jury could find Ortiz guilty of only the lesser offense. *See Hardeman*, 556 S.W.3d at 922-23 (holding trial court erred in denying lesser offense of assault where the jury could have rationally believed testimony that the defendant did not choke the victim but also believed he caused bodily injury to the victim through testimony establishing he grabbed her in some manner during an argument).

Having found error in the trial court's denial of the requested instruction on the lesser included offense of simple assault, we must determine whether that error requires reversal. We analyze harm regarding an erroneous refusal to give a requested instruction on a lesser-included offense under the standard enunciated in *Almanza v. State*, 686 S.W.2d 157, 171 (Tex. Crim. App. 1985) (op. on reh'g). *Braughton v. State*, 569 S.W.3d 592, 613 (Tex. Crim. App. 2018). "When, as here, the defendant has preserved error by requesting the challenged instruction, we reverse the conviction if the denial of the instruction resulted in some harm to the defendant." *Id*. Ordinarily, if the absence of a charge on the lesser included offense left the jury with the sole option either to convict the defendant of the greater offense or to acquit him, some harm exists. *Saunders v. State*, 913 S.W.2d 564, 571 (Tex. Crim. App. 1995). Stated differently, "[t]he harm from denying a lesser offense instruction stems from the potential to place the jury in the dilemma of convicting for a greater offense in which the jury has a reasonable doubt or releasing entirely from criminal liability a person the jury is convinced is a wrongdoer." *Hardeman*, 556 S.W.3d at 923 (internal

quotation omitted). Here, the denial of the lesser offense placed the jury in this dilemma; therefore, the failure to submit the lesser offense resulted in some harm.

CONCLUSION

Because the trial court's erroneous refusal to include the requested instruction on the lesser-included offense of misdemeanor assault resulted in some harm to Ortiz, we reverse the trial court's judgment of conviction and remand the cause to the trial court for further proceedings.

Irene Rios, Justice

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